SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1967

No. 371

LOUIS NASH,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MILTON E. GRUSMARK
Attorney for Petitioner
407 Lincoln Road
Miami Beach, Florida 33139

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ARGUMENT

In addition to the Federal question (R. 639, 641) presented at the trial showing the jurisdiction of this court, it is submitted that because of the peculiar circumstances of this case questions raised by the Petitioner for the first time should be available on appeal to this Court. Petitioner NASH was convicted at the trial of conspiracy to commit grand larceny and grand larceny. It was urged then, and at all times, that there was no evidence to support the conviction of either crime. On appeal, the Florida District Court of Appeal found that there was insuf-

ficient evidence to convict of the crime of grand larceny but there was evidence to convict of conspiracy to commit grand larceny. It is urged that these conclusions are so inconsistent that their affirmance by the State Supreme Court presents a Federal question to be decided by this Court. If the Defendant had actually conspired to steal the whiskey, then he would be guilty as a principal of the larceny itself. Florida Statute § 776.011. However, the District Court of Appeal found that there was no evidence of larceny; this was entirely consistent with the record. This finding, with its appellate support, so emphasized the fact that there was no evidence in the record to support the conviction of conspiracy that the **Thompson v. Louisville,** 362 U.S. 199, 4 L.Ed. 2d 654, 80 SC 624, 80 ALR 2d 1355, doctrine (which provides that a lack of due process results where there is no evidence offered of the crime) is applicable. It was impossible prior to that time to allege this Federal question since, as pointed out in **Thompson, supra,** this Court will not look at the quality of evidence nor will it weigh the quantity; it will only consider the absence of evidence. A Petitioner should not be denied his Constitutional rights merely because his attorney in the trial court did not foresee the fact that the Federal question would arise from the opinion of an appellate court. This Court has held that where the facts of the case make it impossible to raise the Federal question at an earlier date, it will accept the case if raised at the earliest possible time. **Great Northern Railway Company v. Sunburst Oil and Refrigeration Company,** 287 U.S. 358 (1932).

The next point presented to this Court is that because there is no evidence to support a conviction for conspiracy to commit grand larceny the conviction should be re-

versed. As previously pointed out, the record of this case is completely silent as to any inference of the Petitioner NASH'S participation in the specific conspiracy to steal whiskey. This Court stated in **Ingram v. U. S.**, 360 U.S. 672 (1959), that a conspiracy cannot be proved by building inference upon inference nor can it be used as a "dragnet to draw in all substantive crimes." Yet this is precisely what was done by the State.

The State contends that the use of the word "hot" by the Petitioner indicates that he knew that the whiskey was stolen. The record, however, clearly shows that at all times the Petitioner was referring to untaxed or "Island" whiskey (Tr. 17, 18, 30, 32, 53, 61, 63 and 77). There is no statement by NASH or conversation with NASH concerning stolen whiskey. Also, the State has attempted to draw a pattern from the facts which would show that NASH knew of the theft. The record, however, contains no evidence of any knowledge by NASH that the whiskey was stolen. All that the record shows is that NASH agreed to supply "Island" whiskey, that he made a deal to get a supply and that he received money for it. The record does not show that he ever was a party to the theft or knew of the theft either before or after it occurred. In fact, even the Florida District Court of Appeal on review of the facts and with the presumption of validity in favor of the trial court that the verdict was correct found no such evidence. The State also relies heavily on the fact that NASH failed to insure that the truck used for transporting the liquor would be returned to its rightful owner. It is submitted that Nash was not charged nor convicted for an illegal use of a truck but for conspiring to steal whiskey. The use of the truck cannot possibly show beyond a "shadow of a doubt" that NASH

knew the whiskey was stolen. Petitioner further contends that the law of Florida provides that where circumstantial evidence is relied upon to convict a person charged with a crime, the evidence must not only be consistent with the defendant's guilt but must also be inconsistent with any reasonable hypothesis of innocence, and evidence which leaves one with nothing stronger than a suspicion that the defendant committed the crime is not sufficient to sustain a conviction. **Mayo v. State,** 71 So.2d 899 (1954). In this case the courts below relied completely on circumstantial evidence. It is reasonable to conclude from the record that the Petitioner thought the whiskey was "Island" whiskey, and never knew that it was stolen.

Petitioner contends that the confession admitted into evidence over his objection (Tr. 285, 287, 289 and 409) was a post-conspiratorial statement, that it was prejudicial to the Defendant NASH, and that it was not properly limited by the trial court so as to prevent any "spill-over" effect. As pointed out by this Court in **Delli Paoli v. U.S.,** 352 U.S. 232 (1957), where a post-conspiratorial confession is used at the trial, the trial judge must go to great lengths to caution the jury that it is evidentiary only as to the party making it. This instruction is to be made both at the time the evidence is admitted and in the charges to the jury. In this case, however, the trial judge cautioned the jury only during his charges and then not in the manner that has been prescribed by this Court.

It is conceded that the cases permit inconsistent verdicts. Petitioner respectfully urges, however, that in this case logic impels a limitation on that statement of law.

For example, one might be indicted for conspiracy to defraud a bank. The conspiracy would be Count I. Substantive counts might be added charging specific overt acts such as arranging a fraudulent loan with "A" as Count II, arranging a fraudulent loan with "B" as Count III, arranging a fraudulent loan with "C" as Count IV, etc. In that case, it is conceivable that the facts might show guilt of the conspiracy, although there were no facts sufficient to prove one or more substantive counts.

In this case, however, there is only one fact involved.

The sale of whiskey is not in issue. Everyone concedes that it was sold. The single factual question presented insofar as NASH alone is concerned is his involvement in the theft. That raises the only fact question of knowledge of the theft, for no one contends that he personally participated in the theft. The rejection of guilt by the District Court of Appeals in holding that no evidence existed to show involvement in the theft inescapably leads to the conclusion that there was no evidence to prove the only charging fact concerning Nash in any phase of the case. Where one fact alone is involved Petitioner respectfully submits that the absence of any evidence sufficient to prove that single fact on one count must lead to the conclusion that evidence is not present on the other count. In this case inconsistent verdicts are untenable.

CONCLUSION

This case represents an extension of the principle of inconsistent verdicts discussed by this honorable Court in **Dunn v. U. S.**, 284 U.S. 390 (1932). Petitioner urges granting of the Petition.

Respectfully submitted,

MILTON E. GRUSMARK
Attorney for Petitioner
407 Lincoln Road
Miami Beach, Florida 33139